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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 746

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 747

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's request that the United States comment upon the Jurisdictional Statements filed by appellants. For the reasons indicated below, we believe that the questions presented by the appeals warrant plenary consideration. If was for this reason that the United

States as appellee refrained from filing a motion to affirm the judgment of the district court.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court which dismissed appellants' complaint seeking to set aside an order of the Interstate Commerce Commission.

1. *The Situation Prior to the Proposed Rates.*—The New York Central Belt Line west of Kankakee, Illinois, roughly parallels the Illinois River, on which Mechling Barge Lines, Inc., operates its barges. The Belt Line is in competition with Illinois River barge lines for the business of transporting corn from northern and central Illinois to intermediate points for reshipment to destinations on the eastern seaboard. Farmers located in northern and central Illinois are in a position to sell their corn either (1) to elevators located along the river for transportation by barge to an east-west railroad or (2) to elevators located along New York Central's Belt Line for transportation by the Belt Line to a connecting east-west railroad. Since the elevators bear the cost of this transportation, the amount they can bid for this corn is significantly affected by rates they must pay (J.S.M. App. C, p. 442).[1]

At one time, corn from this affected area moved over all-rail routes to eastern destinations. About 23 years ago, the development of commerce on the Illinois River started a diversion of traffic from the all-

[1] J.S.M. refers to the Jurisdictional Statement of Mechling Barge Lines, Inc., *et al.* J.S.C. refers to the Jurisdictional Statement of the Board of Trade of the City of Chicago.

rail routes to barge-rail routes. Moved by barge from river ports to Chicago, Illinois, the corn or corn products then moved by rail to eastern destinations. As a result of this diversion, corn traffic on the Belt Line dwindled almost to the vanishing point (J.S.M. App. C, p. 440). The little corn the Belt Line continued to carry was principally corn owned by the Commodity Credit Corporation which is usually shipped by rail for export and is charged a special rail export rate which is less than the domestic rate for corn or corn products(*ibid.*).

Historically, the rail rates on grain and grain products from the affected territory to eastern destinations were composed of combinations of rail rates to and from Chicago. Later when single-factor rates were established they were made equal to these combinations, with the rates on corn products uniformly 0.5 cents higher than those on corn (J.S.M. App. C, p. 438). Thus, before the proposed rates[2] went into effect the rail rate from origins on the Kankakee Belt Line to eastern destinations was 72 cents for corn and 72.5 cents for corn products via Chicago (including Chicago via Kankakee), either as a through rate or as a combination of the 23 cents local rate to Chicago and the 49 or 49.5 cent proportional rate to the east. On the other hand, the average rate on barge traffic which competed with the Belt Line from ten ports along the Illinois River, to Chicago was 4.625 cents (effective December 1957, this average barge rate was raised

[2] Even though the rates now under attack have been in effect for over five years (see *infra*, pp. 6–7), for the sake of simplicity we shall refer to them as the proposed rates.

to 4.825 cents) (J.S.M. App. E, p. 9a). This corn and corn products could then be shipped to the east by rail for 49 or 49.5 cents, just like the corn shipped to Chicago by rail. Therefore transportation of ex-barge[3] corn was substantially cheaper than the transportation of ex-rail corn to eastern destinations.

2. *The Proposed Rates.*—In order to recapture the traffic which had been lost to competing barge lines, the New York Central and its connecting carriers proposed a rate structure featuring a new system of proportional rates. A proportional rate of 5 cents (now 6 cents because of general rate increases) on ship-

[3] The following definitions of terms will be helpful to an understanding of the grain rate structure with which this case is concerned.

Ex-barge corn—Corn transported from a point by rail which has been shipped to that point by barge.

Ex-rail corn—Corn transported from a point by rail which has been shipped to that point by rail.

Local rate—A rate which applies to the transportation of grain and grain products between local points.

Flat rate—A rate of unrestricted application which is not dependent on prior or subsequent transportation.

Proportional rate—A rate which is restricted to traffic having prior or subsequent transportation and is only a portion of the total transportation charge.

Ex-barge proportional rates—Proportional rates applicable to ex-barge traffic.

Ex-rail proportional rates—Proportional rates applicable to ex-rail traffic.

Joint through rate—The total rate from the origin to the final destination published as a single rate covering the entire movement.

Transit—The privilege of stopping grain or grain products at any point for storing, processing, and subsequent shipping.

Division—The share of a joint through rate received by any of the participating carriers.

ments of corn from origins along the Belt Line to Kankakee or Chicago was established (J.S.M. App. C, p. 439). This proportional 6-cent rate does not apply to shipments from origins on the Belt Line ending at Chicago or Kankakee, but only in conjunction with the existing reshipping rate on traffic destined by rail to points in the east, and only to corn milled in transit. At the same time the single factor rate for through movements from these origins to the east, is restricted so as not to apply when the proposed proportional rate is lower (*ibid.*).

The mechanism by which the rate reduction is accomplished is as follows: Shipments originating on the Belt Line are charged the local or flat rate of 23 cents to Kankakee. After milling in transit, if the corn products are shipped east, the inbound charges are adjusted to receive the benefit of the lower proportional rate to Kankakee, so that a credit of 17 cents is applied to outbound movements of corn products by rail whether on New York Central or its connecting carriers (J.S.M. App. C, p. 440). Thus the inbound 6-cent proportional rate does not exist as a separate charge but is applicable only on through movements of corn products to eastern destinations, when milled in transit (*id.* at p. 450).

3. *Proceedings before the Commission.*—The New York Central and its connecting carriers filed the proposed rates to become effective on December 15, 1956, and they were permitted to become effective at that time without protest. Section 4 of the Interstate Commerce Act, 49 U.S.C. 4, prohibits rate charges over the same line which are higher for a ~~long~~ SHORT

haul than for a short haul, where the shorter is part of the longer haul. It was subsequently discovered that by reducing the rates from origins on the Belt Line to eastern destinations but not the rates for the shorter distances from the origins to points in the mid-west (central territory), fourth-section departures were created. Furthermore, the reduction of the rates from the origins on the Belt Line to the east made the rates lower than those applying to the shorter distances from Kankakee and points east, north, and south of Kankakee to the eastern destinations. In other words, under the proposed rate it was less expensive to ship corn products from origins on the Belt Line to the east than from these same origins to points in the mid-west or from Kankakee and points near Kankakee to the east. While the applicants for the new rates believed that outstanding relief, which had been granted by the Commission, covered these departures, in fact they had not been previously authorized (J.S.M. App. C, p. 439).

The appellants filed a protest with the Commission regarding the departures from Section 4. The applicants thereafter cured the fourth-section departures relating to shipments to central territory by reducing the rates from origins on the Belt Line to this area. New York Central applied for and received from the Fourth Section Board of the Commission temporary authority for fourth-section departures which the modified rates still required. On August 21, 1957, certain of the appellants commenced an action in the United States District Court for the Northern District of Illinois to suspend the Commission's tem-

porary fourth-section order. The court on that date issued a temporary restraining order which was vacated on November 28, 1957, when the action was dismissed for want of jurisdiction. Thus, the rates which are the subject of the Commission order now under attack have been in effect for nearly five and one-half years (J.S.M. App. C, p. 439).

a. The rail carriers' application for fourth-section relief was set down for a hearing before an examiner. At this hearing, the Chicago Board of Trade (appellant in No. 747), protested that the proposed rates would violate Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), which prohibits undue discrimination against shippers and localities. The Chicago Board of Trade charged that the proposed rates were prejudicial because Chicago grain merchants, as a practical matter, are prevented from buying corn off the Kankakee Belt Line. When corn is brought into Chicago or Kankakee, the inbound freight charges are borne by the country shipper. After the proposed rates went into effect, processors at Kankakee and points east knew that they could take advantage of the new reduced rates, since corn processed at these locations would be shipped east, and such processors would obtain a credit for the difference between the 23-cent flat rate and the 6-cent proportional rate. On the other hand, when Chicago grain dealers and elevator operators purchase corn on the Chicago market they are not sure whether the corn will be reshipped east. The reason for this is that Chicago buyers are not processors but dealers who intend to sell to still unknown buyers for an unknown destination. Hence,

the Chicago buyers do not know whether the corn they will purchase will qualify for the reduced inbound rate from origins on the Belt Line to Chicago. Therefore, the processors at Kankakee, with the assurance that they could take advantage of the reduced proportional rate, are able to outbid Chicago merchants who lack this assurance. As a result, the Board of Trade contended, the proposed rates discriminate against Chicago grain merchants (see J.S.C., p. 8).

Corn processors at Chicago, it was charged, are also discriminated against by the proposed rate. The claim made on their behalf is that the transit privileges in the proposed tariffs are limited so that Chicago processors cannot take advantage of the reduced proportional rate and that certain territorial restrictions in the proposed tariff favor the processor at Kankakee (J.S.C., p. 9).

The Commission rejected the protestants' contentions under Section 3(1) on the ground that "these [discrimination] issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings" (J.S.M. App. C, p. 451). It went on, however, to note that "there is no indication of undue damage to Chicago" (*ibid.*).[4]

b. During the same proceeding before the hearing examiner, Mechling Barge Lines (one of the appellants in No. 746), attempted to challenge the proposed

[4] The Commission also noted that the New York Central intended to remove the milling-in-transit limitation on the proposed rate, but as yet this has not been done.

rates because of alleged discrimination against the barge lines carrying corn to Chicago. It charged that such discrimination violated the provisions of Section 3(4) of the Interstate Commerce Act, 49 U.S.C. 3(4), which prohibits discrimination between connecting carriers. Mechling's position was that when corn comes to Chicago by rail over the Belt Line, and qualifies for the proposed rate, a credit of 13 cents is given to the New York Central by connecting carriers on rail movements to destinations in the east, whereas ex-barge corn is charged the full rate of 49 or 49.5 cents for the movement from Chicago to the east. It was urged that this practice of charging less for ex-rail transportation than ex-barge transportation was condemned as violative of Section 3(4) in *Interstate Commerce Commission* v. *A. L. Mechling Barge Lines*, 330 U.S. 567, and held to be improper, even if accomplished through the division of through rates, in *Dixie Carriers* v. *United States*, 351 U.S. 56 (see J.S.M., p. 19).

At the hearing, Mechling was not permitted to continue cross-examination of a witness on the issue of discrimination against connecting barge lines because the hearing examiner ruled that this issue was not relevant in a fourth-section proceeding. Neither the examiner's nor the Commission's report discussed the Section 3(4) issues which the appellant attempted to raise.

c. Appellants also alleged before the Commission that the proposed rates did not meet the standard of being "reasonably compensatory", which is required by Section 4, 49 U.S.C. 4, in order for rates to qual-

ify for relief from the provisions of that section. The hearing examiner found that the inbound proportional rate from the origins on the Belt Line to Kankakee or Chicago of 5.5 cents (as it was at that time) was less than the out-of-pocket cost of the Belt Line, even after being readjusted to take into account certain switching savings which would reduce the New York Central's out-of-pocket costs (J.S.M. App. E, p. 27a). He therefore denied the rail carriers' request for fourth-section relief.

The Commission reversed the examiner. It stated that the inbound proportional rate from origins on the Belt Line to Kankakee or Chicago "has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin" to the east (J.S.M. App. C, p. 450). The Commission said that no useful purpose would be served in a fourth-section proceeding by determining whether each of the component parts of the rate was reasonably compensatory. It reasoned that, if it were to deny fourth-section relief because of a finding that the inbound proportion was not reasonably compensatory, even though the through combination was, the railroads could cure the defect by merely refiling a new through-rate eliminating the proportional rates. Thus, the Commission said that "condemnation based on finding the inbound proportional only to be noncompensatory would be tantamount to condemnation arising out of the method of publication" (*id.* at p. 450).

The Commission therefore granted the fourth-section relief requested by the New York Central and its connecting carriers (J.S.M. App. D, pp. 4a–5a).

4. *District Court Proceedings.*—Appellants, Mechling Barge Lines, Inc. and several grain operators, brought an action in the district court to enjoin the order of the Commission. They alleged that the Commission's authorization of fourth-section relief was improper because the proposed rates were not compensatory, were destructively competitive, and did not preserve the inherent low-cost advantage of the barge lines in violation of Section 4 and of the National Transportation Policy. They also alleged that the Commission erred in refusing to permit cross-examination concerning discrimination against barge transportation in violation of Section 3(4). The Chicago Board of Trade was permitted to intervene as plaintiff and it challenged the Commission's order on the ground that the rates were unduly prejudicial against shippers and localities in violation of Section 3(1).

The district court entered its judgment dismissing the complaint on September 18, 1962 (J.S.M. App. B, p. 2a). It held that the Commission did not have to consider whether the proposed rates violated any other section of the Interstate Commerce Act in a Section 4 proceeding (J.S.M. App. A, p. 4a); that there was substantial evidence to support the Commission's finding that a "special case" for the departure from Section 4 existed (*id.* at 6a); and that the rate was not lower than necessary to meet competition (*id.* at 6a–7a). It also upheld the Commission's determination that the combination rate and not the proportional rate from origins on the Belt Line to Kankakee or Chicago was the relevant one to examine in determining whether the proposed rate was reasonably compensatory (*id.* at 6a).

ARGUMENT

The issues presented by this case raise several substantial questions in the administration of the Interstate Commerce Act warranting plenary argument before this Court.

1. The Commission's decision to refrain from deciding the issues of undue discrimination against Chicago grain interests, in violation of Section 3(1) of the Interstate Commerce Act,[5] and discrimination against connecting barge carriers, in violation of Section 3(4) of the Act, raises a serious question. The Commission should of course be allowed considerable discretion in determining its procedures and in handling its own docket. Nonetheless, in the *Intermountain Rate Cases*, 234 U.S. 476, 485–486, this Court said that the Commission's power to relieve carriers from the requirements of Section 4 of the Act:

> * * * is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

The Court has never given any indication, contrary to this statement, that the Commission may ignore

[5] After stating that questions of discrimination are not involved in fourth-section proceedings, the Commission did suggest that Chicago was not being discriminated against. However, this afterthought does not seem to be a finding fully considering and rejecting the Section 3(1) contentions on their merits.

the matter of possible discrimination in violation of Section 3 when granting fourth-section relief.

Moreover, a strong argument may be made that sound administrative practice requires the Commission to consider whether Section 3 has been violated so that a proposed rate which violates the policy of the statute may be stricken down at the earliest opportunity. There is little reason in the ordinary case, the argument continues, to require that an additional proceeding be instituted to consider the issue of discrimination.

2. Assuming that the Commission is not bound by statute to consider alleged violations of Section 3 in a fourth-section proceeding, the possibility of unfair administrative procedure must be considered. The Commission had said that it deemed undue discrimination in violation of Section 3 to be relevant in Section 4 proceedings in a long line of cases (see J.S.C. App. F), including one decided in 1959, the year before the Commission's order was issued in this case and after the decision in *Seatrain Lines, Inc.* v. *United States,* 168 F. Supp. 819 (S.D. N.Y.), upon which the railroads have principally relied. Since the appellants were given no warning prior to the hearing that the Commission would not consider their allegations under Section 3, it is arguable that appellants were warranted in assuming that they might raise such issues without having to file a formal complaint under Section 13 of the Act.

3. The Commission's determination that the rates were reasonably compensatory also raises substantial questions. The Commission's decision that the pro-

posed rates met the "reasonably compensatory" test of Section 4 is based on its determination that the inbound proportional rate to Kankakee or Chicago had no independent existence, and that, in any event, the applicant railroads could have achieved the same result by filing a single factor rate for shipments from origins on the Belt Line to the east.

Section 4, 49 U.S.C. 4, states that "the Commission shall not permit the establishment of *any charge* to or from the more distant point that is not reasonably compensatory" (emphasis added). This language may indicate that the Commission must look to each factor of the rate as filed—an approach which would seem to encompass the inbound proportional rate from origins on the Belt Line to Kankakee or Chicago. If this is so, the Commission order is defective, for the Commission made no finding as to whether the inbound proportional is compensatory, and the hearing examiner specifically found that it was not (J.S.M. App. E, pp. 27a, 29a, 30a). However, the New York Central argues that the words "to or from the more distant point" should be read to mean the charge to the eastern destinations, since the purpcse of Section 4 is to prevent discrimination against intermediate points, and the only fourth-section departures occur on shipments from Kankakee and points north, south, and west of Kankakee to the east. The problem of statutory construction thus posed is not free from doubt, although the Central's argument may be more consistent with the purpose of Section 4.

There is greater difficulty with the Commission's argument that the inbound proportional rate should be ignored in determining whether the proposed rate was reasonably compensatory because the applicant rail carriers could and would file a single factor rate from the origins on the Belt Line to the east if they were denied fourth-section relief. Aside from any practical reasons which might prevent the rail carriers from filing a single factor rate, approval of such a rate might not be granted. For example, as we discuss below (pp. 15–17), it might be inconsistent with the National Transportation Policy. The appellants, if such a rate were filed, would have the opportunity to challenge this single factor rate and raise any objections which they might have. As it is, the Commission has approved the proposed rate because it deems it to be the same as another rate, but no one has had an opportunity to attack the hypothetical rate. This Court has no basis upon which to decide whether this non-existent rate would be valid if filed, and it is doubtful that appellants should have the burden of conjuring up possible defects in a hypothetical rate at this time.

4. Finally, the case may well present a serious question as to the validity of the proposed rates under the National Transportation Policy. Although the facts are not clear, there may be basis for arguing that the purpose and effect of the proposed rate are to divert traffic from competing barge lines while decreasing the net revenue of the railroads. There is no finding that the railroads will carry any greater amount of

corn products east of Chicago and Kankakee under the proposed rate. The only additional rail traffic that the proposed rate would appear to generate is from the points on the Belt Line to Kankakee and Chicago, traffic which the hearing examiner found to be bringing in revenue "somewhat less" than the out-of-pocket costs of the New York Central (J.S.M. App. E, p. 27a). Therefore, the logical inference from the hearing examiner's finding (which was not overruled by the Commission) is that the railroads are taking traffic from the barge lines by charging rates at which the railroads lose money. This would be contrary to the National Transportation Policy's prohibition against destructive competition and its admonition to the Commission to recognize the inherent advantages of each mode of transportation. See *Interstate Commerce Commission* v. *The New York, New Haven and Hartford R.R. Co.*, Nos. 108, 109, 110, and 125, this Term, decided April 22, 1963.

The Commission did state that the Central's revenue position would be increased more than 5.5 cents per hundred pounds which the new tariffs set as the rates for shipments to Chicago or Kankakee. The Commission said that, in addition, the proposed rates encouraged corn shipments from origins on the Belt Line directly to the east via Kankakee, instead of proceeding from the origins to Chicago to Kankakee and the east. The old combination rates, which were lower than the separate local rates, did not apply to shipments moving directly from the origins to

Kankakee and then to the east without passing through Chicago, while the new rates applied to shipments moving through either Chicago or Kankakee. The New York Central would save, as to corn products moving under the new rates to Kankakee without going to Chicago, a 2-cent switching cost and the cost of a 37.7 mile longer haul resulting from the transshipment of corn from Chicago to Kankakee and then east (J.S.M. App. C, p. 449).

The Commission's findings, however, are incomplete on this point, because no appraisal was made as to the volume of traffic which had previously moved southward from Chicago to Kankakee and then east, as compared to the volume following that course after the rate change. In short, the Commission did not make a finding that the gross dollar revenues received under the new rate, plus the actual dollar volume of savings, amounted to more than the Central's loss in carrying the grain from Belt Line points to Kankakee. Findings on this subject would be necessary in order to determine the net effect of the changed rates on New York Central's revenue position.[6]

[6] Appellants in No. 746 also raise an additional issue as to whether there is substantial evidence to support the finding that a "special case" exists authorizing the proposed rates in question. We do not believe that any real issue is presented as to whether "compelling competition" warranting the finding of a special case exists. The record shows clearly that virtually all rail traffic from points on the Belt Line to Chicago and Kankakee had been diverted from the railroads to the barges.

CONCLUSION

Without suggesting that the decision below should be reversed, we respectfully submit that the Court should note probable jurisdiction and set these cases for argument.

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